APPENDIX.

FILE
NU. 29

IN THE

Supreme Court of the United States

October Term, 1971
No. 71-1192

DONALD GOLDSTEIN, RUTH KOVEN and DONALD KOVEN,

Petitioners,

vs.

THE STATE OF CALIFORNIA,

Respondent.

On Writ of Certiorari to the Appellate Department, Superior Court of California, County of Los Angeles.

Petition for Certiorari Filed March 15, 1972.
Certiorari Granted May 30, 1972.

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INDEX TO APPENDICES.

Page

Docket Entries ..... App. p. 1

A. In the Municipal Court of Los Angeles Judicial District in the County of Los Angeles, State of California 1

B. In the Appellate Department Superior Court Los Angeles County 13

Misdemeanor Complaint 15

Engrossed Statement on Appeal 23

Exhibit 1. Reporter's Transcript of Proceedings Wednesday, March 3, 1971 30

Exhibit 2. Search Warrant No. 3026 37

Affidavit in Support of and Petition for Search Warrant 38

APPENDIX.

Docket Entries.

A. In the Municipal Court of Los Angeles Judicial District in the County of Los Angeles, State of California.

[Title and Cause]

Date

March 22, 1971

Complaint filed declared to by R. E. Reed charging the Defendant with having on 3-3-71 at Los Angeles City, in the County of Los Angeles, State of California, committed a misdemeanor, to-wit: Violation of Section 653h of the Penal Code of the State of California (Counts 1 through 140).

March 22, 1971

Declaration in support of arrest warrant made under section 2015.5 C.C.P. filed. Good cause shown pursuant to section 1427 P.C.

Court summons issued to appear in Div. 59 on March 29, 1971, 9 a.m.

March 29, 1971

Deft. notified to appear in Div. 59 on March 29, 1971, 10:30 a.m.

AS TO EACH DEFENDANT

In the following case Archer K. Leung, C.S.R. Reporter, is ordered to take down proceedings as provided by law.

Case called, Judge David V. Kenyon presiding. Both parties ready. People represented by White Mitchell (D.C.A.) Defendant represented by Atty. Daye Sinn Deputy Public Defender for arraign-

ment only (in pro. per.). Defendant in court, duly arraigned, informed of the charge/s against him and of his legal rights. Defendant gives true name as charged and enters his plea of not guilty of the offense charged. Defendant with counsel in open court each personally demands jury trial. Defendant instructed to appear personally for trial. Trial set for 6/17/71 9 A.M. in Div. 22 Bail $..... incl. P.A. Deft. Committed. Bail to Stand. Defendant released on his own recognizance.

DEFENDANT PERSONALLY WAIVES STATUTORY TIME FOR TRIAL

Defendant duly arraigned. Gives true name as charged. Complaint read and defendant advised that he is entitled to a public trial within 45 days; to the aid of the court in producing witnesses in his behalf; to be confronted with the witnesses against him in the presence of the court; not to be a witness against himself; to a trial by jury; to be admitted to reasonable bail; to be represented by a lawyer of his own choosing; or to have counsel provided for him if he is financially unable to employ counsel. Defendant advised of the nature of the charges and the consequences of the plea.

April 15, 1971

Notice of Motion for Advancement of trial date filed.

April 26, 1971

In this case Jean Terry, Reporter, is ordered to take down proceedings as provided by law. Div. 20 convened at ....M., Cause called. Judge Wilbur G. Dettmar presiding. Both parties ready. People

represented by Philip Shiner (D.C.A.) Defendants not in court and represented by Daye Shinn; John Le Van Deputy Clerk; Cause advanced for purpose of motion trial date to stand. Defense counsel will be available.

June 14, 1971

In this case Brent Perry Shaw, Reporter is ordered to take down proceedings as provided by law. Div. 20 convened at ....M., Cause called. Judge Wilbur G. Dettmar presiding. Both parties ready. People represented by Thomas W. Smotrich (D.C.A.) Defendants not in court and represented by .....; John Le Van, Deputy Clerk;

Substitution of attorney filed. Motion to substitute Gottlieb and Locke in place of Daye Shinn is granted.

On Defendant's motion Cause continued to 6-21-71, 8:30 a.m. for motion under 1538.5 Penal Code, motion to traverse warrant and for trial. Time is waived.

June 21, 1971

AS TO EACH DEFENDANT

In the following case A.M. Moell Reporter is ordered to take down proceedings as provided by law. Cause called. Judge Wilbur G. Dettmar presiding. People represented by J. Adajian (D.C.A.) Defendant in court and represented by D. Gottlieb and the following proceedings were had: cause advanced for purpose of motion. Motion by defendant for a continuance Granted. Cont. to 6-22-1971, 9 a.m. Div. 20 Deft. waives statutory time for trial.

Defendant released on his own recognizance.

June 22, 1971

In this case Alice M. Moell Reporter is ordered to take down proceedings as provided by law. Div. 20 convened at ....M., Cause called. Judge Wilbur G. Dettmar presiding. Both parties ready. People represented by J. Adajian (D.C.A.) Defendant in court and represented by Daniel M. Gottlieb; John Le Van Deputy Clerk;

Transferred to Div. 5 for trial. In this case Arlene Jenkins Reporter is order to take down proceedings as provided by law. Div. 15 convened at 10 A.M. Cause called. Judge Erich Auerbach presiding. Both parties ready. People represented by David Margulies (D.C.A.) Defendants in court and represented by Daniel M. Gottlieb; C. Hegler Deputy Clerk. Pre-Trial Conference in chambers. Recess to 2 P.M.

June 22, 1971

At 2:16 P.M. hearing under Penal Code section 1538.5. Waiver of Conflict of Interest documents signed June 17, 1971 filed.

June 22, 1971

Points and authorities in support of Motion to Suppress filed. People's Exhibit (1) Reporter's Transcript, in re: search warrant No. 3026. (2) Copy of search warrant No. 3026. (3) Unauthorized recording. (4) Authorized recording.

June 22, 1971

Motion to quash search warrant argued. Court finds that affidavit was not defective and motion denied. Evidentiary hearing under Penal Code section 1531. Defendant's motion for exclusion of witness—granted. Witnesses sworn for defend-

ants: David Margulies, Xavier Pitassi. Counsel stipulate and court orders witnesses Mrs. Friedman and Miss Aviles excused from further attendance and to be placed on call. Court adjourned to 10 A.M. June 23, 1971.

June 23, 1971

In this case Arlene Jenkins Reporter is ordered to take down proceedings as provided by law. Div. 15 convened at 10 A.M. Cause called. Judge Erich Auerbach presiding. Both parties ready. People represented by David Margulies (D.C.A.) Defendants in court and represented by Daniel M. Gottlieb; C. Hegler Deputy Clerk.

Hearing resumes on Defendants' motion under Penal Code section 1531. Witnesses sworn for Defendants: Robert E. Reed.

Motion submitted.

June 23, 1971

Court finds that the search warrant was valid and not subject to a Motion to Quash.

Court finds that there was full compliance with section 1531 Penal Code. Based on the two findings the court denied Defendants motion to suppress under section 1538.5 Penal Code.

Recess to 2:30 P.M.

At 2 P.M. proceedings resumed on Defendants' Motion to Dismiss.

At 2:17 P.M. court adjourned to 10 A.M. June 24, 1971.

In this case Arlene Jenkins Reporter is ordered to take down proceedings as provided by law. Div. 15 convened at 10 A.M. Cause called. Judge Erich Auerbach presiding. Both parties ready.

People represented by David Margulies (D.C.A.) Defendants in court and represented by Daniel M. Gottlieb. C. Hegler, Deputy Clerk.

June 24, 1971

Defendants' Motion to Dismiss Complaint on ground statute unconstititional—Motion Denied.

Recess to 2 P.M.

At 1:30 P.M. Pre-Trial Conference in Chambers.

At 2:30 P.M. Cause continued to June 28, 1971 at 9:30 A.M. Time waived.

Court orders personal appearance of defendants to be tried.

June 28, 1971

In this case Arlene Jenkins Reporter is ordered to take down proceedings as provided by law.

Div. 15 convened at 9:40 A.M. Cause called. Judge Erich Auerbach presiding. Both parties ready.

People represented by David Margulies (D.C.A.)

Defendant in court and represented by Daniel M. Gottlieb. C. Hegler, Deputy Clerk.

Pre-Trial Conference in Chambers.

Recess to 2 P.M.

At 1:30 P.M. Pre-Trial Conference in Chambers.

At 3 P.M. Defendants, Donald Koven, Ruth Koven and Donald Goldstein, in Open Court, and leave of court first obtained, withdraws [sic] their plea of not guilty heretofore entered and now enters [sic] their plea of Nolo Contendere to Counts 1 through 10 inclusive.

People and each defendant and their counsel in open court personally waives [sic] jury trial.

Each Defendant waives right to confrontation of witnesses and privilege against self incrimination.

Court finds this plea is fully and intelligently entered and each defendant understands the nature of the crime and consequences of such a plea.

The following People's Exhibits admitted in evidence by reference:

(5) 14 boxes containing 4062 miscellaneous pre-recorded 8 track stereo cartridges:

(6) 2 boxes containing 201 miscellaneous 8 track stereo tapes:

(7) Labels contain in file cabinets but not file cabinets itself:

(8) 4 boxes containing miscellaneous labels.

(9) 1 box containing miscellaneous 236 master 8 track stereo tapes:

(10) 2 boxes containing 352 miscellaneous 8 track stereo tapes in cartridges:

(11) 2 boxes containing miscellaneous tape cartridges and addressed to "Ed Shaw":

(12) 2 boxes containing miscellaneous tape cartridges labeled for shipping to Mobile Stereo:

(13) 1 box containing 182 tape cartridges:

(14) 2 boxes containing cartridge jackets:

(15) 1 box containing 2 red loose leaf note books, manila folders and catalog and order sheets, 2 empty 8 track cartridge, rubber stamp "Sonar Distributors":

(16) 1 box containing miscellaneous blank tapes on spools, tapes on hubs found on reproduction machine.

June 28, 1971

In this case Arlene Jenkins Reporter is ordered

to take down proceedings as provided by law.

Div. 15 convened at 3 P.M., Cause called. Judge Erich Auerbach presiding.

Both parties ready. People represented by David Marguiles (D.C.A.)

Defendants in court and represented by Daniel M. Gottlieb; C. Hegler, Deputy Clerk.

As to Defendant Donald Koven time waived for sentence and there being no legal cause why judgment should not be pronounced:

As to Count 1

Six months county jail, suspended, summary probation for three years on the following terms and conditions:

(1) Pay a fine of $500.00 or serve 100 days in the county jail, plus penalty assessment.

(2) That defendant refrain from causing to be transferred sounds recorded on any record or tape onto a tape or phonograph record with the intent to sell such tape or phonograph record on which the sounds have been transferred without the consent of the owner of the original. Nor shall he be a member of any partnership, conduct any business, own any stock in a corporation or be an officer or director of a corporation engaged in such activity, nor be an employee of any organization engaged in such activity nor have any financial interest in any entity so engaged.

(3) That the defendant not sell any tapes, recordings, or phonograph records described in the above conditions of probation.

(4) That he obey all laws.

Sentence on counts 2 to 10 inclusive, $500.00 or serve 100 days in county jail suspended.

Counts 11 through 140 dismissed on motion of people.

Stay of execution to July 7, 1971.

June 28, 1971

As to Defendant Ruth Koven time waived for sentence and there being no legal cause why judgment should not be pronounced:

As to Count 1

Ninety days county jail, suspended, summary probation for three years on the following terms and conditions:

(1) Pay a fine of $500.00 or serve 100 days in the county jail, plus penalty assessment.

(2) That defendant refrain from causing to be transferred sounds recorded on any record or tape onto a tape or phonograph record with the intent to sell such tape or phonograph record on which the sounds have been transferred without the consent of the owner of the original. Nor shall she be a member of any partnership, conduct any business, own any stock in a corporation or be an officer or director of a corporation engaged in such activity, nor be an employee of any organization engaged in such activity, nor aid or abet any person or corporation engaged in such activity nor have any financial interest in any entity so engaged.

(3) That the defendant not sell any tapes, recordings, or phonograph records described in the above conditions of probation.

(4) That she obey all laws.

Sentence on counts 2 to 10 inclusive, $500.00 or serve 100 days in the county jail suspended.

Counts 11 through 140 dismissed on motion of the people.

Stay of execution to July 7, 1971.

June 28, 1971

As to defendant Donald Goldstein time waived for sentence and there being no legal cause why judgment should not be pronounced:

As to Count 1

Sixty days county jail, suspended, summary probation for three years on the following terms and conditions:

(1) Pay a fine of $100.00 or serve 20 days in the county jail, plus penalty assessment.

(2) That defendant refrain from causing to be transferred sounds recorded on any record or tape onto a tape or phonograph record with the intent to sell such tape or phonograph record on which the sounds have been transferred without the consent of the owner of the original. Nor shall he be a member of any partnership, conduct any business, own any stock in a corporation or be an officer or director of a corporation engaged in such activity, nor be an employee of any organization engaged in such activity, nor aid or abet any person or corporation engaged in such activity nor have any financial interest in any entity so engaged.

(3) That the defendant not sell any tapes, recordings, or phonograph records described in the above conditions of probation.

(4) That he obey all laws.

Sentence on counts 2 to 10 inclusive, $500.00 or serve 100 days county jail suspended.

Counts 11 through 140 dismissed on motion of the people.

Stay of execution to July 7, 1971.

June 28, 1971

In this case Arlene Jenkins, Reporter is ordered to take down proceedings as provided by law.

Div. 15 convened at 3 P.M., Cause called. Judge Erich Auerbach presiding.

Both parties ready. People represented by David Margulies (D.C.A.).

Defendants in court and represented by Daniel M. Gottlieb; C. Hegler, Deputy Clerk.

People's motion to dismiss counts 1 through 140 as to defendants Xavier Pitassi, Robert Ivey, Lillian Bruin, [sic] Ruth Luftig, Jean Taxey, Sonor Distributors, Inc., a corp., Muntz Mobile Stereo Pak Inc.—granted in interest of justice.

Each of the above defendants through their counsel stipulated to probable cause.

June 29, 1971

In this case Arlene Jenkins, Reporter is ordered to take down proceedings as provided by law.

Div. 15 convened at 11 A.M. Cause called. Judge Erich Auerbach presiding. Both parties ready. People represented by David Marguiles (D.C.A.)

Defendants in court and represented by Daniel M. Gottlieb. C. Hegler, Deputy Clerk.

Defendants in court with counsel at request of court for clarification and correction of terms of probation in condition 2, addition of the words "or phonograph record" after the word "tape". Court delivers written expungement forms pursuant to provision 1203.4 of the Penal Code of State of California to each defendant. Court advises defendants that they are entitled to written papers setting forth the terms and length of probation. Defendants waive time for immediate delivery of

said writing and agreed that it may be sent this date to their counsel, Mr. Gottlieb.

July 7, 1971.

In this case no reporter is ordered to take down proceedings as provided by law. Div. 15 convened at 12:01 P.M. Cause called. Judge Erich Auerbach presiding. Both parties ready. People not represented by (D.C.A.) Defendants not in court and represented by Paul T. Locke. C. Hegler Deputy Clerk.

As to Donald Goldstein, Ruth Koven, Donald Koven: Notice of appeal filed. Upon filing of notice of appeal, each of the appealing defendants may continue to remain upon their own recognizance in lieu of bail.

Respondent notified by mail of the filing of notice of appeal.

July 12, 1971.

Defendant's proposed statement on appeal filed with proof of service by mail. (as to Goldstein, Koven, Ruth & Koven, Donald.)

August 4, 1971.

Hearing to settle Defendants' Proposed Statement on Appeal as to Donald Goldstein, Ruth Koven and Donald Koven, set for August 11, 1971 at 1:30 P.M. in Division 15.

Notices mailed, with affidavits of service by mail.

August 11, 1971.

Conference had with respective counsel. Court directs defense counsel to engross statement relating to certain matters agreed upon by parties as

part of statement on Appeal continued to September 1, 1971 at 1:30 p.m. by stipulation.

August 30, 1971.

Notice of Continuance of Hearing to settle Statement on Appeal to September 2, 1971 at 1:30 P.M. in Div. 15 by agreement of parties filed.

August 31, 1971.

Defendants' Proposed Statement on Appeal filed.

September 2, 1971.

Settlement conference continued to 11 A.M. September 8, 1971.

September 8, 1971.

Engrossed Statement on Appeal filed.

The Court does now settle and allow the foregoing Engrossed Statement on Appeal and certifies that the same is a true and correct statement of the proceedings had in the above entitled action.

September 13, 1971.

I hereby certify, this to be a true and correct copy of the original docket on file in this office. George J. Barbour, Clerk of Municipal Court, City of Los Angeles, State of California. By Barbara L. Stepniak, Deputy.

B. In the Appellate Department Superior Court Los Angeles County.

[Title and Cause]

September 15, 1971.

Papers on Appeal from the Municipal Court of the Los Angeles Judicial District filed as follows:

Notice of Appeal; Complaint; Transcript of Docket; Statement on Appeal; Search Warrant; Affidavit in Support of and Petition for Search Warrant; Return to Search Warrant; Clerk's Certificate.

September 15, 1971.

Order filed setting dates for hearing and for filing briefs:

Appeal set for hearing on November 4, 1971 at 9:30 a.m.

Appellant's brief by September 30, 1971.

Respondent's brief by October 12, 1971.

Appellant's brief by October 18, 1971.

Notice mailed to counsel.

October 1, 1971.

Appellants' Opening Brief filed.

October 12, 1971.

Respondent's Brief filed.

November 4, 1971.

Cause is orally argued by both counsel and is ordered submitted.

November 12, 1971.

Judgment affirmed. Appeal from order denying motion to suppress evidence under Penal Code Section 1538.5 and the now appealable Order denying matters to dismiss is dismissed. Memorandum and judgment filed. Notices mailed.

November 17, 1971.

Petition for Rehearing/Certification filed.

November 30, 1971.

Petition for rehearing denied. Petition for certification granted. Order filed. Notices mailed.

November 30, 1971.

Cause certified to Court of Appeal. Order filed. Notices mailed.

December 1, 1971.

Cause transmitted to Court of Appeal.

December 1, 1971.

Receipt for Order Denying Rehearing and Granting Certification and Order Certifying Cause to clarification.

December 7, 1971.

Receipt from Court of Appeal for file—filed.

December 17, 1971.

Court of Appeal Order Denying Transfer—filed

December 17, 1971.

Court of Appeal Order Denying Transfer and Remittitur sent to lower court. Original records returned to trial court.

December 27, 1971.

Remititur receipt filed. Receipt For Original Record Filed and Court of Appeal Order Denying Transfer.

June 2, 1972.

U.S. Supreme Court Order Granting Writ of Certiorari filed.

Misdemeanor Complaint.

[Title and Cause]

COMES NOW the undersigned and states that he is informed and believes, and upon such information and belief declares: That on or about March 3, 1971, and continuously for a period of 11 months imme-

diately prior thereto, at and in the City of Los Angeles, in the County of Los Angeles, State of California, a misdemeanor to-wit: VIOLATION of Section 653h of the Penal Code of the State of California was committed by DONALD GOLDSTEIN; RUTH KOVEN also known as RUTH GOLDSTEIN; XAVIER PITASSI also known as SAM PITASSI; DONALD KOVEN also known as ED MOSS; ROBERT IVEY; LILLIAN BRINN; RUTH LUFTIG; JEAN TAXEY; SONAR DISTRIBUTORS, INC., a corporation; MOBILE STEREO, LTD., a corporation; MUNTZ MOBILE STEREO PAK, INC., in that they wilfully, unlawfully and knowingly transferred and caused to be transferred sounds recorded on a tape, with the intent to sell and cause to be sold, such tape on which such sounds are so transferred, to-wit: copies of a tape entitled CARPENTERS/CLOSE TO YOU without the consent of the owner, A&M RECORDS.

COUNT II

For a further, separate and second cause of action, being a different offense belonging to the same class of crimes and offenses set forth in Counts I hereof, affiant complains and says: That on or about March 3, 1971, and continuously for a period of 11 months immediately prior thereto, at and in the City of Los Angeles, in the County of Los Angeles, State of California, a misdemeanor, to-wit: VIOLATION of Section 653h of the Penal Code of the State of California was committed by DONALD GOLDSTEIN; RUTH KOVEN also known as RUTH GOLDSTEIN; XAVIER PITASSI also known as SAM PITASSI; DONALD KOVEN also known as ED MOSS; ROBERT IVEY; LILLIAN BRINN; RUTH LUFTIG; JEAN TAXEY; SONAR DISTRIBUTORS, INC., a corporation; MO-

BILE STEREO, LTD., a corporation; MUNTZ MOBILE STEREO PAK, INC., in that they wilfully, unlawfully and knowingly transferred and caused to be transferred sounds recorded on a tape with the intent to sell and cause to be sold, such tape on which such sounds are so transferred, to-wit: copies of a tape entitled BLODWYN PIG/AHEAD RINGS OUT without the consent of the owner, A&M RECORDS.

COUNT III

For a further, separate and third cause of action, being a different offense belonging to the same class of crimes and offenses set forth in Counts I & II hereof, affiant complains and says: That on or about March 3, 1971, and continuously for a period of 11 months immediately prior thereto, at and in the City of Los Angeles, in the County of Los Angeles, State of California, a misdemeanor, to-wit: VIOLATION of Section 653h of the Penal Code of the State of California was committed by DONALD GOLDSTEIN; RUTH KOVEN also known as RUTH GOLDSTEIN; XAVIER PITASSI also known as SAM PITASSI; DONALD KOVEN also known as ED MOSS; ROBERT IVEY; LILLIAN BRINN; RUTH LUFTIG; JEAN TAXEY; SONAR DISTRIBUTORS, INC., a corporation; MOBILE STEREO, LTD., a corporation; MUNTZ MOBILE STEREO PAK, INC., in that they wilfully, unlawfully and knowingly transferred and caused to be transferred sounds recorded on a tape with the intent to sell and cause to be sold, such tape on which such sounds are so transferred, to-wit: copies of a tape entitled HERB ALPERT and THE TIJUANA BRASS/ GREATEST HITS without the consent of the owner, A&M RECORDS.

COUNT IV

For a further, separate and fourth cause of action, being a different offense belonging to the same class of crimes and offenses set forth in Counts I, II, III hereof, affiant complains and says: That on or about March 3, 1971, and continuously for a period of 11 months immediately prior thereto, at and in the City of Los Angeles, in the County of Los Angeles, State of California, a misdemeanor, to-wit: VIOLATION of Section 653h of the Penal Code of the State of California was committed by DONALD GOLDSTEIN; RUTH KOVEN also known as RUTH GOLDSTEIN; XAVIER PITASSI also known as SAM PITASSI; DONALD KOVEN also known as ED MOSS; ROBERT IVEY; LILLIAN BRINN; RUTH LUFTIG; JEAN TAXEY; SONAR DISTRIBUTORS, INC., a corporation; MOBILE STEREO, LTD., a corporation; MUNTZ MOBILE STEREO PAK, INC., in that they wilfully, unlawfully and knowingly transferred and caused to be transferred sounds recorded on a tape with the intent to sell and cause to be sold, such tape on which such sounds are so transferred, to-wit: copies of a tape entitled FREE/FIRE AND WATER without the consent of the owner, A&M RECORDS.

COUNT V

For a further, separate and fifth cause of action, being a different offense belonging to the same class of crimes and offenses set forth in Counts I through IV hereof, affiant complains and says: That on or about March 3, 1971, and continuously for a period of 11 months immediately prior thereto, at and in the City of Los Angeles, in the County of Los Angeles, State of California, a misdemeanor, to-wit: VIOLATION of Section 653h of the Penal Code of the State

of California was committed by DONALD GOLDSTEIN; RUTH KOVEN also known as RUTH GOLDSTEIN; XAVIER PITASSI also known as SAM PITASSI; DONALD KOVEN also known as ED MOSS; ROBERT IVEY; LILLIAN BRINN; RUTH LUFTIG; JEAN TAXEY; SONAR DISTRIBUTORS, INC., a corporation; MOBILE STEREO, LTD., a corporation; MUNTZ MOBILE STEREO PAK, INC., in that they wilfully, unlawfully and knowingly transferred and caused to be transferred sounds recorded on a tape with the intent to sell and cause to be sold, such tape on which such sounds are so transferred, to-wit: copies of a tape entitled LEE MICHAELS without the consent of the owner, A&M RECORDS.

COUNT VI

For a further, separate and sixth cause of action, being a different offense belonging to the same class of crimes and offenses set forth in Counts I through V hereof, affiant complains and says: That on or about March 3, 1971, and continuously for a period of 11 months immediately prior thereto, at and in the City of Los Angeles, in the County of Los Angeles, State of California, a misdemeanor, to-wit: VIOLATION of Section 653h of the Penal Code of the State of California was committed by DONALD GOLDSTEIN; RUTH KOVEN also known as RUTH GOLDSTEIN; XAVIER PITASSI also known as SAM PITASSI; DONALD KOVEN also known as ED MOSS; ROBERT IVEY; LILLIAN BRINN; RUTH LUFTIG; JEAN TAXEY; SONAR DISTRIBUTORS, INC., a corporation; MOBILE STEREO, LTD., a corporation; MUNTZ MOBILE STEREO PAK, INC., in that they wilfully, unlawfully and knowingly transferred and caused to be transferred sounds recorded on a tape

with the intent to sell and cause to be sold, such tape on which such sounds are so transferred, to-wit: copies of a tape entitled LEE MICHAELS/BARREL without the consent of the owner, A&M RECORDS.

COUNT VII

For a further, separate and seventh cause of action, being a different offense belonging to the same class of crimes and offenses set forth in Counts I through VI hereof, affiant complains and says: That on or about March 3, 1971, and continuously for a period of 11 months immediately prior thereto, at and in the City of Los Angeles, in the County of Los Angeles, State of California, a misdemeanor, to-wit: VIOLATION of Section 653h of the Penal Code of the State of California was committed by DONALD GOLDSTEIN; RUTH KOVEN also known as RUTH GOLDSTEIN; XAVIER PITASSI also known as SAM PITASSI; DONALD KOVEN also known as ED MOSS; ROBERT IVEY; LILLIAN BRINN; RUTH LUFTIG; JEAN TAXEY; SONAR DISTRIBUTORS, INC., a corporation; MOBILE STEREO, LTD., a corporation; MUNTZ MOBILE STEREO PAK, INC., in that they wilfully, unlawfully and knowingly transferred and caused to be transferred sounds recorded on a tape with the intent to sell and cause to be sold, such tape on which such sounds are so transferred, to-wit: copies of a tape entitled LEE MICHAELS/CARNIVAL OF LIFE without the consent of the owner, A&M RECORDS.

COUNT VIII

For a further, separate and eighth cause of action, being a different offense belonging to the same class of crimes and offenses set forth in Counts I through VII hereof, affiant complains and says: That on or

about March 3, 1971, and continuously for a period of 11 months immediately prior thereto, at and in the City of Los Angeles, in the County of Los Angeles, State of California, a misdemeanor, to-wit: VIOLATION of Section 653h of the Penal Code of the State of California was committed by DONALD GOLDSTEIN; RUTH KOVEN also known as RUTH GOLDSTEIN; XAVIER PITASSI also known as SAM PITASSI; DONALD KOVEN also known as ED MOSS; ROBERT IVEY; LILLIAN BRINN; RUTH LUFTIG; JEAN TAXEY; SONAR DISTRIBUTORS, INC., a corporation; MOBILE STEREO, LTD., a corporation; MUNTZ MOBILE STEREO PAK, INC., in that they wilfully, unlawfully and knowingly transferred and caused to be transferred sounds recorded on a tape with the intent to sell and cause to be sold, such tape on which such sounds are so transferred, to-wit: copies of a tape entitled HERB ALPERT AND THE TIJUANA BRASS/GOING PLACES without the consent of the owner, A&M RECORDS.

COUNT VIX

For a further, separate and ninth cause of action, being a different offense belonging to the same class of crimes and offenses set forth in Counts I through VIII hereof, affiant complains and says: That on or about March 3, 1971, and continuously for a period of 11 months immediately prior thereto, at and in the City of Los Angeles, in the County of Los Angeles, State of California, a misdemeanor, to-wit: VIOLATION of Section 653h of the Penal Code of the State of California was committed by DONALD GOLDSTEIN; RUTH KOVEN also known as RUTH GOLDSTEIN; XAVIER PITASSI also known as SAM PITASSI; DONALD KOVEN also known as ED MOSS;

ROBERT IVEY: LILLIAN BRINN; RUTH LUFTIG; JEAN TAXEY; SONAR DISTRIBUTORS, INC., a corporation; MOBILE STEREO, LTD., a corporation; MUNTZ MOBILE STEREO PAK, INC., in that they wilfully, unlawfully and knowingly transferred and caused to be transferred sounds recorded on a tape with the intent to sell and cause to be sold, such tape on which such sounds are so transferred, to-wit: copies of a tape entitled QUINCY JONES/WALKING IN SPACE without the consent of the owner, A&M RECORDS.

COUNT X

For a further, separate and tenth cause of action, being a different offense belonging to the same class of crimes and offenses set forth in Counts I through IX hereof, affiant complains and says: That on or about March 3, 1971, and continuously for a period of 11 months immediately prior thereto, at and in the City of Los Angeles, in the County of Los Angeles, State of California, a misdemeanor, to-wit: VIOLATION of Section 653h of the Penal Code of the State of California was committed by DONALD GOLDSTEIN; RUTH KOVEN also known as RUTH GOLDSTEIN; XAVIER PITASSI also known as SAM PITASSI; DONALD KOVEN also known as ED MOSS; ROBERT IVEY; LILLIAN BRINN; RUTH LUFTIG; JEAN TAXEY; SONAR DISTRIBUTORS, INC., a corporation; MOBILE STEREO, LTD., a corporation; MUNTZ MOBILE STEREO PAK, INC., in that they wilfully, unlawfully and knowingly transferred and caused to be transferred sounds recorded on a tape with the intent to sell and cause to be sold, such tape on which such sounds are so transferred, to-wit: copies of a tape entitled SERGIO MENDES AND BRASIL

'66/CRYSTALL ILLUSIONS without the consent of the owner, A&M RECORDS.

All of which is contrary to the law in such cases made and provided, and against the peace and dignity of the People of the State of California. Declarant and complainant therefore prays that a warrant may be issued for the arrest of said defendant(s) and that ..... he ..... may be dealt with according to law.

Executed at Los Angeles, California, on 3-22-71. I declare under penalty of perjury that the foregoing is true and correct.

.....

Declarant and Complainant

Engrossed Statement on Appeal.

[Title and Cause]

PROCEDURAL FACTS

March 22, 1971

Complaint filed charging defendants with violations of section 653(h) of the Penal Code of the State of California in 140 counts. A declaration in support of the arrest warrant under section 2015.5 CCP is filed.

March 29, 1971

Defendants appear by Attorney Daye Shinn, are arraigned on the charges and enter pleas of not guilty. The trial is set for June 17, 1971. Defendants personally waived statutory time for trial.

April 15, 1971

Notice of Motion for Advancement of Trial filed.

April 26, 1971

Defendants appear by Attorney Daye Shinn. Defendants not in Court. Trial date to stand. Defense counsel will be available.

June 14, 1971

Defendants not in Court. A substitution of attorneys filed. Motion to Substitute Gottlieb and Locke in place of Daye Shinn is granted. On defendants' motion the case is continued to June 21, 1971, for a motion under Section 1538.5 of Penal Code, Motion to Traverse Warrant, Motion to Dismiss the Complaint on the grounds that section 653(h) of the Penal Code is unconstitutional. Time for trial was waived. Defendants are represented by attorney D. Gottlieb.

June 21, 1971

Defendants are represented by D. Gottlieb. Cause is continued to June 22, 1971, on defendants' motion. Defendants waive statutory time for trial.

June 22, 1971

Defendants in Court represented by Daniel M. Gottlieb. Cause is transferred to Division 15 for trial. A waiver of conflict of interest documents signed June 17, 1971, is filed. Points and authorities in support of motion to suppress and motion to dismiss filed. Defendants move to quash Search Warrant pursuant to Penal Code section 1538.5 and return all property on the following grounds:

a. The affidavit and testimony in support of the warrant are insufficient because they fail to set forth underlying circumstances necessary to enable the magistrate independently to

judge the validity of the informant's conclusion that defendants were without authority to reproduce the recordings.

b. The search warrant was issued without reasonable or probable cause in that

(1) California Penal Code Section 653(h) conflicts directly with Article I, Section 8, Clause 8 of the United States Constitution and the implementing Federal Statutes because it establishes a State copyright;

(2) California Penal Code Section 653(h) conflicts directly with Article I, Section 8, Clause 8 of the United States Constitution and the implementing Federal Statutes because it prohibits copying of public domain matter for unlimited times;

(3) The holdings of *Sears* and *Compco* not only apply to the instant case, but are dispositive of the question of the constitutionality of Penal Code Section 653(h).

People's Exhibit 1, Reporter's Transcript in re Search Warrant No. 3026, (2) copy of Search Warrant No. 3026, (3) unauthorized recording, (4) authorized recording are entered in evidence. Cause is argued. Court finds that affidavit was not defective and the motion is denied.

Defendants move to suppress evidence and for return of property under Penal Code Section 1531 on the grounds that the execution of the search warrant did not comply with requirements of Section 844 of the Penal Code. Evidentiary hearing

under Penal Code section 1531 is had. Defendants' motion for exclusion of witnesses is granted. Witnesses for defendants David Margulies and Xavier Pitassi are sworn. Counsel stipulate and Court orders witnesses Mrs. Friedman and Miss Aviles excused from further attendance and to be placed on call. Hearing adjourned to June 23, 1971.

June 23, 1971

Defendants represented by D. Gottlieb. Hearing resumes on defendants' motion under Penal Code section 1531. Witness for defendants sworn, Robert E. Reed. Motion submitted. Court finds that search warrant was valid and not subject to a motion to quash. Court finds there was full compliance with section 1531 Penal Code. Based on the two (2) findings, the Court denied defendants' motion to suppress under section 1538.5 of the Penal Code. Defendants moved to dismiss the complaint on the ground that the statute is unconstitutional. Court is adjourned to June 24, 1971.

June 24, 1971

Defendants represented by D. Gottlieb. Defendants made a motion to dismiss the Complaint on the following grounds:

a. California Penal Code Section 653(h) conflicts directly with Article I, Section 8, Clause 8 of the United States Constitution and the implementing Federal Statutes because it establishes a State copyright;

b. California Penal Code Section 653(h) conflicts directly with Article I, Section 8, Clause 8 of the United States Constitution and the

implementing Federal Statutes because it prohibits copying of public domain matter for unlimited times;

c. The holdings of *Sears* and *Compco* not only apply to the instant case, but are dispositive of the question of the constitutionality of Penal Code Section 653(h).

Defendants' Motion is denied. Pre-trial conference in chambers. Cause continued to June 28, 1971. Time is waived. Court orders personal appearance of defendants to be tried.

June 28, 1971

Pre-trial conference in chambers. Defendants represented by D. Gottlieb. As a result of the extensive conference in chambers, a plea bargain between the prosecution and defense and with the concurrence of the court is reached. Donald Koven, Ruth Koven and Donald Goldstein in open court, with full knowledge of the plea bargain and concurring in it, and leave of the court first obtained, withdraw their pleas of not guilty heretofore entered, and enter pleas of nolo contendere to Counts 1 through 10, inclusive, People and each defendant and their counsel in open court personally waive jury trial. Each defendant waives right to confrontation of witnesses and privileges against self-incrimination. Court finds the plea is fully and intelligently entered, and each defendant understands the nature of the crime, and consequences of such plea. Peoples' Exhibits 5 through 16 are admitted into evidence by reference, being property seized pursuant to the search warrant. The court imposed the following terms of probation as a result of the plea bargain, in which defendants concurred. Defendant Donald

Koven waives time for sentence. As to Count 1, defendant is granted summary probation for three years on certain conditions with six (6) months county jail suspended. Defendant Ruth Koven waives time for sentence. As to Count 1, summary probation is granted for three (3) years on certain terms and conditions, with ninety (90) days county jail suspended. Defendant Donald Goldstein waives time for sentence. As to Count 1, he is granted summary probation for three (3) years on certain conditions, with sixty (60) days county jail suspended. People's motion to dismiss Counts 11 through 140 as to defendants Donald Koven, Ruth Koven, and Donald Goldstein is granted. People move to dismiss all counts as to all other defendants. People's motion is granted in the interest of justice, each of such defendants through their counsel stipulate to probable cause.

June 29, 1971

Defendants in Court with counsel Daniel M. Gottlieb. Court clarifies and corrects terms of probation. Court delivers written expungement forms pursuant to section 1203.4 of the Penal Code of the State of California as to each defendant.

July 7, 1971

Defendants file Notice of Appeal. Court issues Certificate of Probable Cause pursuant to section 1237.5 of the Penal Code stating it does not believe such certificate is necessary.

Execution of sentence is stayed.

STATEMENT OF FACTS

People's Exhibit 1, Reporter's Transcript in re Search Warrant No. 3026, is attached hereto as

Exhibit 1 and incorporated herein by reference. People's Exhibit 2, copy of Search Warrant 3026, and affidavit in support thereof, is attached hereto as Exhibit 2, and incorporated herein by reference.

GROUNDS FOR APPEAL AND DESIGNATION OF RECORD

1. The affidavit in support of the warrant was insufficient under the United States Constitution, Amendments IV and XIV, and under the law of the State of California.

2. The Search Warrant was issued without reasonable or probable cause, in that section 653(h) of the Penal Code is invalid under the United States Constitution.

3. California Penal Code Section 653(h) conflicts directly with Article I, Section 8, Clause 8 of the United States Constitution and the implementing Federal Statutes because it establishes a State copyright;

4. California Penal Code Section 653(h) conflicts directly with Article I, Section 8, Clause 8 of the United States Constitution and the implementing Federal Statutes because it prohibits copying of public domain matter for unlimited times;

5. The holdings of *Sears* and *Compco* not only apply to the instant case, but are dispositive of the question of the constitutionality of Penal Code Section 653(h).

People's Exhibits 1 and 2 are made part of the Record on Appeal.

DATED: September 8, 1971.

ERICH AUERBACH
Judge of the Municipal Court

EXHIBIT 1.

Reporter's Transcript of Proceedings
Wednesday, March 3, 1971.

653h P.C.

[Title and Cause]

LOS ANGELES, CALIFORNIA, WEDNESDAY, MARCH 3, 1971.

—o—

(Whereupon, the following proceedings were held in chambers in Division 17.)

THE COURT: We are in chambers in Division 17. I understand this is in regard to search warrant number 3026?

MR. MARGULIES: Yes, your Honor.

THE COURT: You may proceed.

MR. MARGULIES: David Margulies of the City Attorney's Office, and this is Howard Smith. This is police officer Robert M. Reed and Miss Friedland and Miss Aviles; is that correct?

Actually, what I am going to do is, first, I would like to; this is an application for a search warrant.

Do you swear that the contents in there are true and to the best of your information and belief?

OFFICER REED: I do.

THE COURT: I had better swear the witness.

ROBERT E. REED

was called as a witness by and on behalf of the People, and having first been duly sworn, was examined and testified as follows:

THE COURT: Will you state your name, for the record, please?

THE WITNESS: Robert E. Reed.

MR. MARGULIES: Do you swear that the contents in this search warrant are true and to the best of your information and belief?

THE WITNESS: I do.

MR. MARGULIES: In this matter, Mrs. Friedland, you have talked to Officer Reed, the investigating officer, and with the City Attorney.

Would you please swear this witness?

JOSEPHINE JOY FRIEDLAND

was called as a witness by and on behalf of the People, and having first been duly sworn, was examined and testified as follows:

THE CLERK: Will you state your name, for the record, please?

THE WITNESS: Josephine Joy Friedland.

THE CLERK: Will you spell your last name, for for the record, please?

THE WITNESS: F-r-i-e-d-l-a-n-d.

EXAMINATION

BY THE COURT:

Q In this regard, according to the information given in this particular application for the search warrant, it states that you worked for this particular distributing company, under the names of Muntz Mobil Stereo Pak, Incorporated and Sonar Distributors, located at 4939 Lankershim Boulevard, in Hollywood, California, from September, 1970 to approximately the middle of February, 1971; is that correct?

A Yes.

Q It states at that time that you further were hired personally by Mr. Koven?

A Yes.

Q During that time that you had performed various jobs, including the splicing of duplicated 8-track stereo tapes, labeling of 8-track stereo cartridges, operation of a Viking 225 Duplicating machine, and the pulling of 8-track stereo tapes to fill invoices of Sonar Distributors and Muntz Mobil Stereo Pak, Incorporated?

A Yes.

Q And that you also described the fact as to some of the equipment there, the books and records as to how they were maintained and that your paycheck was personally signed, as I believe, by Mr. Koven, and then later his son-in-law; is that correct?

A Yes, sir.

MR. MARGULIES: Stepson, I believe, your Honor.

BY THE COURT:

Q The stepson, I believe, is Mr. Goldstein?

A Yes.

Q And that you had, in the course of your services there, it further states that you had actually operated a recording machine and that you had seen original tapes brought in for the use?

A Yes.

Q In other words, the information has primarily contained as related to here in this particular application is true and correct?

A Yes.

THE COURT: Now, Miss Aviles, you will be sworn in.

CELESTE LORRAINE AVILES

was called as a witness by and on behalf of the People, and having first been duly sworn, was examined and testified as follows:

THE CLERK: Will you state your name, for the record, please?

THE WITNESS: Celeste Lorraine Aviles.

THE CLERK: Will you spell your first name and your last name, for the record, please?

THE WITNESS: C-e-l-e-s-t-e, A-v-i-l-e-s.

EXAMINATION

BY THE COURT:

Q In the application for the warrant, it indicates that you had been employed by Donald Koven from approximately April, 1970 to February, 1971. This is the information you gave to the office of the City Attorney?

A Yes.

Q And that your duties included duplicating unauthorized 8-track stereo tapes, splicing, labeling of 8-track stereo tape cartridges and shrink wrapping; is that correct?

A Yes.

Q And that Donald Koven signed your checks until the time he changed the company name from Muntz Mobil Stereo Pak, Incorporated to Sonar Distributors, at which time Donald Goldstein signed the checks?

A Yes.

Q Donald Goldstein is a stepson of the owner, Mr. Koven?

A Yes.

Q And that also states that you had witnessed on numerous occasions a factory 8-track stereo cartridge opened, the tape removed and wound on the Viking 225 Master Play-back machine?

A Yes.

Q And that you explained roughly how the factory tape is packaged, the fact that it has the name of the

record company, as to local trademark, name of the album, artist and songs on it?

A Yes.

Q And that you, on numerous times, observed Donald Koven enter the location with labels, blank tapes and cartridges?

A Yes.

THE COURT: Thank you.

MR. MARGULIES: Will you swear Mr. Smith?

HOWARD S. SMITH

was called as a witness by and on behalf of the People, and having first been duly sworn, was examined and testified as follows:

THE CLERK: Will you state your name, for the record, please?

THE WITNESS: Howard S. Smith.

EXAMINATION

BY THE COURT:

Q Mr. Smith, you are an attorney licensed to practice law in the State of California; is that correct?

A Yes, your Honor.

Q In the application for the search warrant, it indicates here that you had or that you have related to Mr. Reed or to the City Attorney the fact that you knew of named recordings being reproduced without authority?

A I know that the recording companies, Columbia Records, A&M Records and ABC-Dunhill Records have not given any authority to Mr. Koven to reproduce or duplicate master recordings or phonograph records or tapes owned by them.

Q Are you aware of the fact that the sound recordings, Beatles on Capitol Records, Herb Alpert and Joe Cocker on A&M Records, Simon and Garfunkel on

Columbia Records, Three Dog Night and Steppenwolf on ABC-Dunhill Records are bootlegged or reproduced without authority?

A I am aware that any reproductions which these ladies made were made without authority, with respect to the companies I represent.

I have spoken to Mr. Robert Karp, who is an attorney and head of the Legal Department at Capitol and he informed me that Mr. Koven does not have authority with respect to the Beatles album.

THE COURT: Thank you very much.

Mr. Reed, I will ask you a few more questions.

BY THE COURT:

Q Mr. Reed, you actually have, as indicated, been a member of the Los Angeles Police Department for approximately 19 years; is that correct?

A Yes, sir.

Q And that you have been with the so-called Bunco squad for a period of approximately three years?

A That's correct, your Honor.

Q And as such, that you have performed investigation and contacted the various people referred to in the application for the warrant and the affidavit in support of petition for search warrant, and that you either, through your own knowledge or from statements contained therein, having been attributed to the people present here today, that you have prepared your affidavit in support of the petition of a search warrant?

A That's correct, your Honor.

THE COURT: Off the record.

(Whereupon, an off the record discussion was had.)

State of California, County of Los Angeles—ss.

I, LESTER M. ZIVE, an Official Reporter of the Municipal Court of the Los Angeles Judicial District, County of Los Angeles, State of California, do hereby certify that the foregoing transcript, consisting of 9 pages, is a true, complete and accurate transcription of my stenotype notes taken in the proceedings of the within-entitled matter on the 3rd day of March, 1971, in Division 17 of said court, the Honorable Pat Mullendore, Judge presiding;

Including all of the testimony, objections of counsel, and all matters to which the same relate.

DATED: June 21, 1971.

/s/ Lester M. Zive
LESTER M. ZIVE, C.S.R.
Official Reporter

EXHIBIT 2.

Search Warrant No. 3026.

In the Municipal Court of Los Angeles Judicial District County of Los Angeles, State of California.

The People of the State of California to any Sheriff, Constable, Marshall, Policeman, or any other peace officer in the County of Los Angeles:

Proof of affidavit having been this day made before me by ROBERT E. REED (#6899), Los Angeles Police Officer, that there is probable and reasonable cause for the issuance of the search warrant, as set forth in the affidavit attached hereto and made a part thereof as if fully set forth herein; you are, therefore, commanded to make immediate search in the daytime of the premises located and described as 4930 Lankershim Boulevard, North Hollywood, California, one unit of a green two-story building containing three units all with store fronts on Lankershim Boulevard, this unit having its entrance at the rear of the above address facing an alley which runs parallel with Lankershim Boulevard having the numbers 4930 on the door (see Exhibits One and Two); this unit occupied and controlled by Donald Koven, also known as Ed Moss, Ruth Koven, Donald Goldstein, and Xavier Pitassi also known as Sam Pitassi, collectively doing business as Muntz Mobil Stereo Pak, Inc. and Sonar Distributors, the following personal property, to wit: Invoices with the name Sonar Distributors and/or Mobil Stereo printed thereon dated between April, 1970 and March 3, 1971, showing orders of duplicated 8-track stereo tapes consummated, a red book approximately 3″ x 4″ containing the names of customers who purchased duplicated 8-track stereo cartridges, two Viking 225 tape duplicating machines with one (1) master tape deck

and five (5) slave recording machines each, two cellophane shrink wrap machines, cutting and splicing instruments, black on white catalogue sheets describing 8-track stereo tapes duplicated by Muntz Mobil Stereo Pak, Inc. and Sonar Distributors, title labels approximately 4½" x 2¾", plastic cartridges approximately 5¼" x 4", containing duplicated 8-track stereo tapes (see Exhibit Three attached hereto), empty plastic cartridges approximately 5¼" x 4", cardboard jackets used to cover the plastic cartridges; and 7" reels containing the 8-track stereo prerecorded factory tapes used as the masters from which unauthorized duplicates are made.

And if you find the same or any part thereof, to bring it forthwith before me at the Municipal Court of the Los Angeles Judicial District, County of Los Angeles, State of California, or to any other court in which the offense in respect to which the property or things taken is triable, or retain such property in your custody, subject to the order of this court pursuant to Section 1536 of the Penal Code.

Given under my hand and dated this 3rd day of March, 1971.

PAT MULLENDORE
Judge of the Municipal Court

Affidavit in Support of and Petition for Search Warrant.

In the Municipal Court of Los Angeles Judicial District, County of Los Angeles, State of California.

State of California, County of Los Angeles—ss.

Personally appeared before me this 3rd day of March, 1971, the affiant, ROBERT E. REED (#6899 Bunko-Forgery Division) a peace officer of the City of Los Angeles, who, on oath, makes complaint, and deposes and says that he does believe, that there is now

on the premises located at and also described as 4930 Lankershim Boulevard, North Hollywood, California, one unit of a green, two-story building containing three units all with store fronts on Lankershim Boulevard, this particular unit having its entrance at the rear of the above address facing an alley which runs parallel with Lankershim Boulevard having the numbers 4930 on the door (see Exhibits One and Two, attached hereto); this unit occupied by and controlled by Donald Koven, also known as Ed Moss, Ruth Koven, Donald Goldstein, and Xavier Pitassi, also known as Sam Pitassi, collectively doing business as Muntz Mobil Stereo Pak, Inc. and Sonar Distributors, the following personal property, to wit: invoices with the name Sonar Distributors and/or Mobil Stereo printed thereon, dated between April, 1970 and March 3, 1971, showing purchases of duplicated 8-track stereo tapes consummated, a red book approximately 3″ x 4″ containing the names of customers who purchased duplicated 8-track stereo cartridges between April, 1970 and March 3, 1971, two Viking 225 tape duplicating machines with one (1) master tape deck and five (5) slave recording machines each, two cellophane shrink wrap machines, cutting and splicing instruments, black on white catalogue sheets describing 8-track stereo tapes duplicated by Muntz Mobil Stereo Pak, Inc. and Sonar Distributors, title labels of duplicated 8-track stereo tapes approximately 4½″ x 2¾″, plastic cartridges approximately 5¼″ x 4″ containing duplicated prerecorded magnetic tape (see Exhibit Three, attached hereto), empty plastic cartridges approximately 5 1/3″ x 4″ used to house duplicated prerecorded magnetic tapes, cardboard jackets used to cover the plastic cartridge,

and 7″ reels containing the 8-track stereo prerecorded factory tapes used as the masters from which unauthorized duplicates are made.

Your affiant says that there is probable and reasonable cause to believe and that he does believe that the said property constitutes:

> Property or things in the possession of a person with the intent to use it as a means of committing a public offense, to wit: a violation of Section 653h Penal Code of the State of California.

Your affiant says that the facts in support of the issuance of the search warrant are as follows:

Your affiant has been a police officer for the past nineteen (19) years, employed in such capacity by the Los Angeles Police Department, and has acted and received the information set forth in this affidavit in that capacity.

Your affiant is now and has been for the past three (3) years assigned to the Bunko Detail of the Bunco-Fraud Division thereof.

On the date of March 3, 1971, at approximately 9:00 a.m. your affiant received information from Celeste Lorraine Aviles, Josephine Joy Friedland, and Howard S. Smith regarding the unauthorized reproduction of prerecorded 8-track stereo tapes. Josephine Joy Friedland states that she had been employed by Donald Koven, who operates a business under the name of Muntz Mobil Stereo Pak, Inc. and Sonar Distributors, located at 4930 Lankershim Boulevard, North Hollywood, California, from September, 1970 to the middle of February, 1971. Mrs. Friedland states that she was hired by Mr. Koven personally and told she would be reproducing and splicing prerecorded magnetic tapes. The supervisor of the operation at the

above address is Xavier Pitassi, also known as Sam Pitassi. The various jobs performed by Mrs. Friedland included splicing of duplicated 8-track stereo tapes, labeling of 8-track stereo cartridges, operation of a Viking 225 duplicating machine, and the pulling of 8-track stereo tapes to fill invoices of Sonar Distributors and Muntz Mobil Stereo Pak, Inc.

Josephine Joy Friedland described in detail the activity carried on at 4930 Lankershim Boulevard, North Hollywood. She indicated that they made prerecorded stereo 8-track tape reproductions spliced together to from a continuous loop wound on a hub and encased in plastic cartridges approximately 5¼" x 4". These 8-track stereo tapes were reproductions of 8-track stereo tapes manufactured by most of the major recording companies. An authorized factory 8-track stereo tape, one manufactured by an authorized recording company, would be purchased from a retail outlet to be utilized as the master from which many unauthorized duplicates would be made. This factory 8-track stero tape would be taken out of its cartridge and placed on a 7 inch reel which would in turn be placed on a Viking 225 tape deck play-back unit. Utilizing five tape recording machines connected to this play-back unit, five duplicates of the factory 8-track stereo tape would be made. The duplicating machine used is known as a Viking 225. After the duplicate copies of the 8-track stereo tape were recorded they would be taken off the recording machines and placed into one-half of the plastic cartridge. The tape is then spliced, creating a continuous loop, at which time the other half of the plastic cartridge is secured to the half containing the prerecorded 8-track stereo magnetic tape. The label con-

taining the name of the tape, title, artist and selections on the tape is then affixed to the cartridge. The cartridge is then placed in a jacket and the completed package is shrink wrapped by machine in cellophane; and placed on a shelf.

Mrs. Friedland indicates that from six to seven hundred cartridges a day are produced in this manner, and that the finished product is sold and shipped daily to persons all over the country.

Mrs. Friedland states that she has seen the following factory 8-track stereo tapes duplicated: Beatles on Capitol Records, Herb Alpert and Joe Cocker on A&M Records, Simon and Garfunkel on Columbia Records, Three Dog Night and Steppenwolf on ABC-Dunhill Records. Mrs. Friedland states many others were duplicated but cannot recall their exact names.

Mr. Howard S. Smith, Attorney at Law and member of State Bar of California, stated to affiant that he knows that the above named recordings are being produced without the authority of the named recording companies and artists. Mr. Smith, as an attorney, represents several different recording companies whose recordings are being reproduced without consent.

Attached to the affidavit will be an exhibit marked *4* showing an authorized 8-track stereo tape recording produced by Apple Records, Inc. and an unauthorized 8-track stereo tape marked Exhibit Three made by Mr. Donald Koven and sold and distributed by Muntz Mobil Stereo Pak, Inc. and Sonar Distributors. The authorized 8-track stereo tape was supplied by Mr. Howard S. Smith and the unauthorized 8-track stereo tape was recorded by Sonar Distributors and Donald Koven and supplied by Celeste Lorraine Aviles.

Mrs. Friedland states that the list of customers who purchased duplicated 8-track stereo tapes from Munoz Mobil Stereo Pak, Inc. and Sonar Distributors are kept in a red book which measures approximately 4″ x 3″. Besides customer names the book contains the amount of duplicated 8-track stereo tapes purchased by each customer and the amount they paid for them. The invoices for orders and shipping are prepared by Xavier Pitassi, also known as Sam Pitassi, in triplicate. The merchandise is shipped by parcel post, Greyhound and air freight on a daily basis.

Mrs. Friedland indicates that Mr. Donald Koven is generally present at the location at 4930 Lankershim Boulevard, North Hollywood, and is one of the owners of Muntz Mobil Stereo Pak, Inc. and Sonar Distributors, and is one of the persons who would sign her checks for payment of wages. Mr. Koven would discuss the association that the "bootleg" tape manufacturers have and the court case that they were fighting.

Mr. Donald Goldstein was also present at the location on several occasions and is known to Mrs. Friedland as Donald Koven's stepson. Mr. Goldstein is another person who signed checks for wages and took part in the business operation and might also be one of the owners of the companies in question.

Mrs. Friedland states that catalogue sheets containing the unauthorized duplicated 8-track stereo tapes reproduced by Muntz Mobil Stereo Pak, Inc. and Sonar Distributors are at 4930 Lankershim Boulevard. They have black print on white paper.

Celeste Lorraine Aviles states to affiant that she was employed by Donald Koven from April, 1970 to February, 1971. Her duties included duplicating unauthor-

ized 8-track stereo tapes, slicing, labeling of 8-track stereo tape cartridges and shrink wrapping. Donald Koven signed her checks for wages up until the time he changed the company name from Muntz Mobil Stereo Pak, Inc. to Sonar Distributors, at which time Donald Goldstein signed the checks.

Miss Aviles states she is in accord with those statements made by Mrs. Friedland and can add some additional information.

She witnessed, on numerous occasions, a factory 8-track stereo cartridge opened, the tape removed and wound on the Viking 225 master play-back machine. Miss Aviles explains that a factory tape is a cartridge which has the name of a record company, its logo, trademark, name of the album, artist and songs on it. Miss Aviles states that from this master duplicates were produced as described by Mrs. Friedland.

Miss Aviles states she observed Donald Koven enter the location on numerous occasions with labels, blank tapes and cartridges.

Your affiant commenced the actual physical mechanics of preparing this affidavit and attached search warrant at 9:00 a.m. of March 2, 1971; and your affiant affixed his signature under oath to this affidavit before the undersigned magistrate at the time and date attested by said magistrate; the elapsed time reflected herein has been diligently utilized by your affiant in the mechanics of physically preparing these documents, locating and consulting with Deputy City Attorney David L. Margulies, in reference to the aforementioned preparation; locating the appropriate magistrate and transporting these documents to the magistrate for his official action in connection therewith.

Your affiant has reasonable cause to believe that grounds for the issuance of a search warrant exist, as set forth in Section 1524 of the Penal Code, based upon the aforementioned information, facts and circumstances.

Your affiant prays that a search warrant be issued, based upon the above facts, for the seizure of said property, or any part thereof, in the daytime, and that the same be brought before this magistrate or retained subject to the order of this court, or of any other court in which the offense in respect to which the property or things taken is triable, pursuant to Section 1536 of the Penal Code.

ROBERT E. REED

Subscribed and sworn to before me on this March 3-1971, at ..... a.m. PAT MULLENDORE, Judge of of the Municipal Court.

MULLENDORE, Judge of the Municipal Court.

PROCEEDINGS BELOW.

Opinions and Orders in the court below are printed in the Petition for Writ of Certiorari at Appendices A through D, inclusive.

PETITION FOR A WRIT OF CERTIORARI

ILE COPY

IN THE

Supreme Court of the United States

Supreme Court,
FILE
MAR 15 1
MICHAEL RODAK, JR

October Term, 1971

No. .....

DONALD GOLDSTEIN, RUTH KOVEN, and DONALD KOVEN,

Petitioners,

vs.

STATE OF CALIFORNIA,

Respondent.

Petition for a Writ of Certiorari to the Appellate Department of the Superior Court of the County of Los Angeles, State of California.

ARTHUR LEEDS
PAUL T. LOCKE,
DANIEL M. GOTTLIEB,
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SUBJECT INDEX

	Page
Petition for Certiorari	1
Citation to Proceedings Below	1
Jurisdiction	2
Question Presented for Review	2
Constitutional and Statutory Provisions	3
Statement of Case	4
The State of the Proceedings, and the Manner, in Which the Federal Questions Here Sought to Be Reviewed Were First Raised	5
Reasons for the Grant of Certiorari	7
1. The Question Here Presented Is of Major Importance to a Whole Industry and Requires a Determination by This Court	7
2. The Holdings of Sears and Compco Not Only Apply to the Instant Case, but Are Dispositive of the Question of the Constitutionality of Penal Code Section 653h	10
3. Petitioners' Position Is Supported by the Leading Copyright Authority in the United States	17
4. Petitioners' Position Is In Accord With the Position of the United States Department of Justice	18
Conclusion	19

INDEX TO APPENDICES

Page

Appendix A. Opinion of the Superior Court of the State of California ..... App. p. 1

Appendix B. Order Denying Rehearing and Granting Certification 3

Appendix C. Order Certifying Cause to Court of Appeal 4

Appendix D. Order Denying Transfer 6

TABLE OF AUTHORITIES CITED

Cases	Page
Capitol Records, Inc. v. Erickson, 2 Cal. App. 3d 526 (1969)	6
Capitol Records v. Mercury Records Corp., 221 F. 2d 657 (2d Cir. 1955)	16
CBS v. DeCosta, 377 F.2d 315 (1st Cir. 1967)	16
Cheney Bros. v. Doris Silk Corp., 35 F.2d 279 (2d Cir. 1929) cert. den. 281 U.S. 728 (1930)	16
Compco Corp. v. Day-Brite Lighting, Inc., 376 U.S. 234 (1964)	6, 9, 10, 11, 12, 13, 14, 15, 16, 18
Dutches Music v. Stern, 331 F. Supp. 127 (D.C. Ariz. 1971)	8, 15
Fashion Originators Guild v. F.T.C., 114 F.2d 80 (2d Cir. 1940) aff'd., 312 U.S. 457 (1941)	16
Fonotipia Limited v. Bradley, 171 Fed. 951 (1908)	15
Gantz v. Harris, 98 F. Supp. 906 (S.L.N.Y. 1951) aff'd., 198 F.2d 585 (2d Cir. 1952)	15, 16
G. Ricordi and Co. v. Haendler, 194 F.2d 914 (2d Cir. 1952)	14, 15, 16
International News Service v. Associated Press, 248 U.S. 215 (1918)	18
McIntyre v. Double-A Music Corp., 166 F. Supp. 681 (S.D. Cal. 1958)	16
Sears, Roebuck and Co. v. Stiffel Co., 376 U.S. 225 (1964)	6, 9, 10, 11, 12, 13, 14, 15, 16, 18
Sinatra v. Goodyear Tire & Rubber, 435 F.2d 711 (9th Cir. 1970) cert. denied 402 U.S. 906 (1971)	11
State's Attorney for Prince George's County v. Sekular, 249 Md. 499, 240 A.2d 608 (M.D. Ct. App. 1968)	9

Page

Tape Industries Association v. Younger, 360 F. Supp. 340 (C.D. Cal. 1970) 6, 10, 11, 12

Younger v. Harris, 401 U.S. 37 (1971) 10

Miscellaneous

74 Congressional Record (1931), p. 2034 13

House Report 6927 .....15, 18

House Report 12549 13

House of Representatives, Committee on the Judiciary, Subcommittee No. 3, 92nd Cong., 1st Sess. (1971), pp. 82-114 15

House of Representatives Committee on the Judiciary Subcommittee No. 3, 92nd Cong., 1st Sess. (1971), pp. 121-123 18

House of Representatives Report No. 1687, 71st Cong., 2d Sess. (1430) 13

House of Representatives Report No. 1898, 71st Cong., 2d Sess. (1930) 13

House of Representatives Report No. 2016, 71st Cong., 2d Sess. (1930) 13

House of Representatives Report No. 2222, 60th Cong., 2d Sess., p. 10 13

House of Representatives Report No. 92-487, 92nd Cong., 1st Sess., p. 2 8

Ringer, Barbara, 86th Cong., 2d Sess, The Unauthorized Duplication of Sound Recordings [7 Comm. Print. 1961], Study No. 26, pp. 31-37 13

Senate Bill No. 646 .....15, 18

Senate Bill No. 748 8

Statutes

Page

California Penal Code, Sec. 653h 3, 4, 5, 6, 8, 10, 11, 14, 15, 17

California Penal Code, Sec. 1237.5 5

Maryland Laws, Art. 81, Sec. 232A 9

New York Penal Code Sec. 441-c 8

New York Penal Code, Chap. 890 8

Public Law 92-140 ..... 7, 13, 15

United States Code, Title 17, Sec. 1(e) .. 3, 8, 13, 15

United States Code, Title 17, Sec. 1(f) 3, 7

United States Code, Title 17, Sec. 3 7

United States Code, Title 17, Sec. 101(e) .. 3, 7, 8, 15

United States Code, Title 28, Sec. 1253 10

United States Code, Title 28, Sec. 1257(2) 2

United States Constitution, Art. I, Sec. 8, Cl. 8 .. 3, 5, 16

Textbooks

Nimmer on Copyright (1971 Supplement), p. 18 .. 18

Nimmer on Copyright (1971 Supplement), pp. 55-56 17

IN THE

Supreme Court of the United States

October Term, 1971

No. .....

DONALD GOLDSTEIN, RUTH KOVEN, and DONALD KOVEN,

Petitioners,

vs.

STATE OF CALIFORNIA,

Respondent.

PETITION FOR CERTIORARI.

Donald Goldstein, Ruth Koven and Donald Koven, here and after referred to collectively as Petitioners, hereby petition for a Writ of Certiorari to review the decision of the Appellate Department of the Superior Court of the County of Los Angeles, State of California.

Citation to Proceedings Below.

The opinion of the Appellate Department of the Superior Court of the County of Los Angeles, State of California, has not been published.

Jurisdiction.

The opinion of the Appellate Department of the Superior Court of the State of California for the County of Los Angeles in the instant matter, is set out in Appendix "A" and was entered on November 12, 1971.

A timely petition for rehearing or in the alternative transfer to the Court of Appeal, was filed November 16, 1971.

An order denying rehearing and granting Certification was entered on November 30, 1971, and is set out at Appendix "B". The "Order Certifying Cause to the Court of Appeal", which sets out the question presented to said Court, was also entered November 30, 1971 and a copy of said order is set out at Appendix "C".

The Order denying such transfer was entered by the Court of Appeals, State of California, Second Appellate District, Division 2, on December 16, 1971, and filed on said date, and a copy of said order is set out at Appendix "D".

Jurisdiction to review the proceedings in the Court below is conferred on this Court by Title 28 U.S.C. §1257(2).

Question Presented for Review.

The following question is presented for review by this Court:

> "May the State of California, through its criminal laws, grant copyright protection for unlimited times to sound recordings in the Public Domain, in direct conflict with Article I, §8, Clause 8 of the United States Constitution and the implementing Federal Copyright laws and policy."

Constitutional and Statutory Provisions.

This case involves the following Constitutional and Statutory provisions:

1. Article I, §8, Clause 8 of the Constitution of the United States, which provides as follows:

> "Congress shall have power . . . To promote the Progress of Science and Useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

2. Title 17, United States Code, Sections 1 (e), 1 (f), and 101 (e).

3. California Penal Code §653h which provides as follows:

> "(a) Every person is guilty of a misdemeanor who:
>
> "(1) Knowingly and willfully transfers or causes to be transferred any sounds recorded on a phonograph record, disc, wire, tape, film or other article on which sounds are recorded, with intent to sell or cause to be sold, or to use or cause to be used for profit through public performance, such article on which such sounds are so transferred, without the consent of the owner.
>
> "(2) Sells any such article with the knowledge that the sounds thereon have been so transferred without the consent of the owner.
>
> "(b) As used in this section, 'person' means any individual, partnership, corporation or association; and 'owner' means the person who owns the master phonograph record, master disc, master tape, master film or other device used for repro-

ducing recorded sounds on phonograph records, discs, tapes, films or other articles on which sound is recorded, and from which the transferred recorded sounds are directly or indirectly derived.

"(c) This section shall neither enlarge nor diminish the right of parties in private litigation.

"(d) This section does not apply to any person engaged in radio or television broadcasting who transfers, or causes to be transferred, any such sounds (other than from the sound track of a motion picture) intended for, or in connection with, broadcast transmission or related uses, or for archival purposes."

Statement of Case.

This case involves the narrow, but important question, of whether a state may use its criminal laws to prohibit the copying of items, here sound recordings, which have been sold in large numbers on the open market. In the instant case the petitioners were arrested and charged in a misdemeanor complaint with 144 separate violations of California Penal Code §653h.

The specific charges each alleged that on or about March 3, 1971 and continuously for a period of 11 months immediately prior thereto, the defendants each knowingly manufactured, or sold prerecorded tapes copied ("transferred") from certain musical sound recordings without the consent of the specific record company which owned the rights to the master recording of such copied sound recordings.

As noted below, the petitioners challenged the constitutionality of Penal Code §653h at every step of the proceedings. However, after the trial court refused to

rule the statute unconstitutional, and after preserving their right to appeal under California law,[1] the petitioners pleaded guilty to ten counts of knowingly manufacturing or knowingly selling such copied sound recordings. The petitioners were then each sentenced under Count 1 to six months in the county jail, sentence suspended and given summary probation for three years. The terms of the probation required that each petitioner pay a fine of $500.00 or serve 100 days in the county jail. Further, under the terms of the probation the petitioners are required to refrain from the making of further copies of sound recordings, or selling such copies, without "the consent of the owner of the original." The remaining counts were dismissed.

The State of the Proceedings, and the Manner, in Which the Federal Questions Here Sought to Be Reviewed Were First Raised.

The question here sought to be reviewed, that is, the constitutionality of the California Copyright Statute (*sub noma* California Penal Code §653h) was raised at the very outset of this case. The petitioners moved to quash the search warrant and to have all the property seized thereunder returned on the grounds, *inter alia,* that California Penal Code §653h conflicts directly with Article I, §8, Clause 8 of the United States Constitution and the implementing Federal Statutes because (1) it establishes a state copyright; and (2) it prohibits copying of public domain matter for unlimited times. At that point the petitioners also moved to quash the search warrant on the further grounds that California Penal Code §653h was in direct conflict with this

[1]California Penal Code Section 1237.5.

Court's decision in *Sears, Roebuck and Co. v. Stiffel Co.*,[2] and *Compco Corp. v. Day-Brite Lighting, Inc.*[3] The trial court denied the petitioners' Motion to Quash and held that the Search Warrant was valid.

Petitioners, through their attorney, then made a motion to dismiss the complaint on the grounds set out above with respect to the motion to quash the search warrant. Again the court denied the motion. Thereafter on appeal the petitioners again raised the question of the constitutionality of Section 653h. In fact petitioners were joined by the State in urging the trial court to decide this matter. The Appellate Court noted that:

> "At oral argument, both counsel urged us to decide this case on the broad ground of the Constitutionality of California Penal Code §653h". (Appendix A) (Actually the petitioners had urged the Court to so decide the issue in its brief on appeal as well as at oral argument.)

The Appellate Department of the Superior Court of the State of California for the County of Los Angeles affirmed the trial court's decision on the basis of *Tape Industries Association v. Younger*[4] and *Capitol Records, Inc. v. Erickson.*[4a] The petitioners then moved to have the case transferred to the California Court of Appeals to decide the constitutionality of Penal Code Section 653h. The Superior Court, Appellate Division certified the transfer of the case to the Court of Ap-

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[2]376 U.S. 225 (1964), hereafter referred to as *"Sears"*.

[3]376 U.S. 234 (1964), hereafter referred to as *"Compco"*.

[4]360 F. Supp. 340 (C.D. Cal. 1970), hereafter referred to as *"TIAA"*.

[4a]2 Cal. App. 3d 526 (1969), hereafter referred to as *"Capitol Records"*.

peals on the grounds that it was "necessary to settle an important question of law", to wit, "is Section 653h of the California Penal Code constitutional"? (Appendix C.)

The Court of Appeals, without opinion, ordered that such transfer be denied, and under California law the petitioners had thereby exhausted all their state court appeals. The petitioners have, therefore, filed the instant petition with this Court.

REASONS FOR THE GRANT OF CERTIORARI.

The petitioners request this Court to grant a Writ of Certiorari for the following reasons.

1. The Question Here Presented Is of Major Importance to a Whole Industry and Requires a Determination by This Court.

In October 1971 the President signed Pub. L. 92-140. That law established, for the first time, a limited copyright in sound recordings,[4b] and it also removed the exemption from the Federal criminal laws for violation of a copyright in the underlying musical composition.[4c] Section 3 of the law provides, *inter alia:*

> "The provisions of Title 17, United States Code as amended by Section 1 of this Act shall apply only to sound recordings fixed, published, and copyrighted on and after the effective date of this Act and before January 1, 1975, and nothing in Title 17, United States Code, as amended by Section 1 of this Act, shall be applied retroactively or be construed as affecting in any way any rights with

[4b] Title 17 U.S.C. §1(f).

[4c] Under 7 U.S.C. §101(e), as amended, there is no longer any exemption from criminal prosecution as there was under the old law.

respect to sound recordings fixed before the effective date of this Act."

Thus, Congress has granted copyright protection only to sound recordings fixed during the relatively short period between February 15, 1972 and January 1, 1975. However, Congress has still not granted copyright protection to pre February 15, 1972 recordings.[4d] Nevertheless, California and a few other states have attempted to protect such pre February 15, 1972 sound recordings by enacting their own copy-right laws.[4e] The effect is to disrupt an industry which has estimated annual sales in excess of One Hundred Million Dollars ($100,000,000.00).[4f] If California Penal Code §653h and the other state copyright laws are allowed to stand they will no doubt cripple this industry, which operates validly under paramount Federal Law.[4g] The result to the consumer will of course be higher prices which must result from this state sanctioned monopoly.

It is also important to note that there is a severe risk of a multiplicity of Civil and criminal actions arising

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[4d]It is very doubtful that Congress could have done so even if it wanted to because those recordings are already in the public domain.

[4e]Only a few (less than ten) of the states have enacted laws similar to California Penal Code §653h. See *e.g.* Section 441-c of the New York Penal Law and Chapter 890, Senate Bill No. 748, Texas Statutes.

[4f]H.R. Rep. No. 92-487, 92nd Cong., 1st Sess. at 2.

[4g]No claim has been made in the instant action that the members of the industry in general, or petitioners in particular, have failed to comply with the requirements of Federal law. That is, under Federal law the petitioners and others are entitled to use the compulsory licensing features of Title 17 U.S.C. Section 1(e) and 101(e). *Dutches Music Corp. v. Stern*, 331 F. Supp. 127 (D.C. Ariz. 1971). If petitioners or others fail to comply with sections 1(e) and 101(e) Federal law provides an ample remedy, and there is no need, nor room, for intervention from the various states.

from different interpretations of the *Sears* and *Compco* case by the various state courts.[4h] Thus, more is at issue here than the liberty and finances of the individual petitioners, though such individual liberty and finances of the petitioners and others should not be overlooked. It

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[4h]For example, compare the decision of the court below in the instant case and the decision of the highest court of Maryland in *State's Attorney for Prince George's County v. Sekular*, 249 Md. 499, 240 A.2d 608 (M.D. Ct. App. 1968).

In that case it appeared that the State of Maryland produced and sold uncopyrighted books of detailed land maps. The plaintiff, who "made a business of reproducing some of the maps and offering them for sale to the public" (240 A.2d at 609) brought an action to enjoin the enforcement of Maryland's anti-duplicating law which purported to make it a misdemeanor to "reproduce or duplicate such maps" for purposes of sale (Art. 81, §232A, Md. Laws).

At the trial of the matter the plaintiff testified that he simply made duplicates (photocopies) of the state's map book and sold his duplicates at a substantially lower price than the state's originals. The plaintiff claimed he had a right to do so under the Federal Constitution (240 A.2d at 609) and the court agreed with him. The court reasoned that under *Sears* and *Compco* the questioned statute was unconstitutional.

> "As the State points out, there are some copyright cases which seem not to follow *Sears* and *Compco*, but they are distinguishable from the instant case chiefly because they are concerned with 'misappropriation' and 'unfair competition' laws. But §232A is not an 'unfair competition' statute . . . It is not aimed at the prohibition of any use which would mislead the public as to the source of the map; it simply prohibits absolutely their *reproduction* or *duplication* for the purpose of selling them for profit thereby creating a monopoly for the state.
>
> "Our holding in the case at bar, therefore, goes no further than a declaration that §232A is in conflict with the Federal copyright law, Title 17, U.S.C. §1 *et seq.*, and that by virtue of the supremacy clause of the Federal "constitution, Art. VI, it is invalid." 240 A.2d at 612. (Emphasis added.)

The *State's Attorney, etc.* case cannot be distinguished from the instant case. Here, as in that case, the questioned state statute seeks to establish a monopoly by preventing coyping or duplication. Here, as in that case, the statute is not concerned with protecting the public from being mislead. The conclusion should thus be that here, as in that case, the statute is unconstitutional.

is therefore necessary for all involved that this court settle what has become a very unsettled area.[5]

2. The Holdings of Sears and Compco Not Only Apply to the Instant Case, but Are Dispositive of the Question of the Constitutionality of Penal Code Section 653h.

In *Sears* and *Compco,* this Court held that a state statute which prohibits copying of an unpatented or uncopyrighted item is unconstitutional because it conflicts with paramount Federal law.

> "Today we have held in Sears, Roebuck & Co. v. Stiffel Co., supra, that when an article is unprotected by a patent or a copyright, state law may not forbid others to copy the article. To forbid copying would interfere with the federal policy, found in Art. I, §8, cl. 8 of the Constitution and in the implementing federal statutes of allowing free access to copy whatever the federal patent and copyright laws leave in the public domain." *Compco, supra,* 376 U.S. at 238.

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[5]There is another reason why the Court should grant Certiorari in the instant case. Petitioner Koven is a plaintiff in the *TIAA* case. That case was appealed to this Court under Title 28 U.S.C. §1253. The respondents in that case asked this Court to dismiss the appeal on the grounds that this Court lacked appellate jurisdiction. The appeal was so dismissed by this Court (401 U.S. 902) and is now pending in the United States Court of Appeals for the Ninth Circuit (Case No. 26,628).

The respondents in *TIAA* have asked the Court of Appeals to dismiss the appeal on the basis of *Younger v. Harris,* 401 U.S. 37 (1971) which was decided after the decision by the trial court in *TIAA*.

The Court of Appeals has not ruled on that motion yet but if it dismisses the *TIAA* case Petitioner Koven will have no chance to have his case heard on appeal unless this Court grants a Writ of Certiorari. Petitioners respectfully submit that if the procedure for challenging the constitutionality of state laws, as set out in *Younger v. Harris,* is to work when it is necessary for this Court to grant Certiorari when state courts have refused to apply paramount Federal law.

In the instant case there is no question but that the sound recordings copied or sold by petitioners were *not* covered by copyright. Further, a simple reading of Penal Code §653h establishes that its purpose is to prohibit the copying or sale of uncopyrighted articles in direct conflict with the holdings of this Court in the *Sears* and *Compco* case.

There can here be no question of the state simply inacting a "labelling statute." The statute in question prohibits all copying or selling no matter how the product is labelled. Nevertheless the Court below refused to apply *Sears* and *Compco* on the basis of "the holding of *Tape Industries Association of America v. Younger.*" In that case the Court distinguished *Sears* and *Compco* as follows:

> "*Sears* and *Compco* could cover and immunize the plaintiffs here only if they had copied and imitated the product—that is, if they had listened to the sounds performed and embodied on the records and then had expended the necessary sums to copy and imitate the sounds on their own tapes." *TIAA, supra,* at 350.[6]

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[6]After the *TIAA* decision, the alleged distinction became even more obscure. In *Sinatra v. Goodyear Tire & Rubber,* 435 F.2d 711 (9th Cir. 1970) *cert. denied* 402 U.S. 906 (1971), a case arising under the diversity jurisdiction of the court, the plaintiff alleged that the defendant had copied her recorded performance of a particular musical composition, "These Boots Are Made For Walkin' "; that plaintiff had, through her recording, developed a secondary meaning in her performance; and that defendants by copying that performance were attempting to cause confusion in the minds of the public and were thereby "passing off" their performance as being that of plaintiff. The trial court entered summary judgment for defendant.

The Ninth Circuit, in an opinion written by one of the Judges in *TIAA,* affirmed and reasoned, *inter alia,* that the

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The *TIAA* court, and the court below would thus limit *Sears* and *Compco* to "imitation" type copying only. This is apparently done to allow the states to protect the expenditure of time and money by record companies and musicians.

There is nothing in either the facts or the language of either *Sears* or *Compco* to support such a distinction. The *TIAA* court and the court below would apparently permit copying as long as the method of copying does not "appropriate" the other's development and production efforts. But under federal law these factors are immaterial. In *Sears* the court stated:

> "An unpatentable article, like an article on which the patent has expired, is in the public domain and may be made and sold by whoever chooses to do so. What Sears did was to copy Stiffel's *design*. . . . This it had every right to do under the federal patent laws. That Stiffel originated the pole lamp and made it popular is immaterial. 'Sharing in the goodwill of an article unprotected by patent or trademark is the exercise of a right possessed by all. . . .'" (376 U.S. at 231) (emphasis added.)

There is no indication that Sears Roebuck and Co., expended funds in developing a pole lamp design; it simply copied Stiffel's design, thus necessarily appropriating Stiffel's development costs. This court express-

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plaintiff's claim was barred by this Court's decision in *Sears* and *Compco*, reasoning:

> "[A]s Judge Hand pointed out in his dissent in Capitol *Records, Inc. v. Mercury Records Corp.*, 221 F.2d 657, 666-667 (2d Cir. 1955) to allow unfair competition protection where Congress has not given federal protection is in effect granting state copyright benefits without the federal limitations of time to permit definite public domain use." 435 F.2d at 718.

ly recognized the fact that the costs of advertising (popularization) and even of developing an item's goodwill may be appropriated. There is no basis for saying that production costs—where Congress has denied protection—may not also be appropriated.[7] *Sears* and *Compco* were not based on the type or ex-

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[7]Congress has in fact specifically, and repeatedly, refused to grant copyright protection to sound recordings fixed or published prior to February 15, 1972. The House Report (Report of Committee on Patents, H.R. Rep. No. 2222, 60th Cong. 2d, Sess. 10) which accompanied the bill that became Title 17 U.S.C. § 1(e)—before it was amended by Public Law 92-140—stated immediately following the discussion of Section 1(e):

> "It is not the intention of the committee to extend the right of copyright to the mechanical reproductions themselves, but only to give the composer or copyright proprietor the control, in accordance with the provisions of the bill of the manufacture and use of such devices."

Further, no less than 31 bills had been unsuccessfully introduced in Congress between 1906 and 1951, which if enacted, would have provided coyright protection to sound recordings fixed or published prior to February 15, 1972. (Staff. of Subcomm. on Patents, Trademarks and Copyrights, Senate Comm. on the Judiciary, 86th Cong., 2d Sess. *The Unauthorized Duplication of Sound Recordings* [7 Comm. Print. 1961] (Study No. 26, by Barbara Ringer) at 31-37.) In addition, in 1930, during the Seventy-First Congress, second session, a bill, HR12549, was reported favorably by the Committee on Patents (H.R. Rep. No. 1687, 71st Cong., 2d Sess. (1430), H.R. Rep. No. 1898, 71st Cong., 2d Sess (1930), and H.R. Rep. No. 2016, 71st Cong., 2d Sess. (1930)). That bill contained a provision, at paragraph "(q)", listing sound recordings as one of the classes of copyrightable works, thereby granting full copyright protection to such sound recordings.

The Committee on Patents reported HR12549 favorably, with paragraph "(q)" intact. However, when the bill reached the floor of the house, that paragraph was stricken by unanimous consent (74 Cong. Rec. 2034 (1931)), and the bill without paragraph "(q)" was passed by the House and the Senate. Petitioners suggest that this action taken by Congress on HR12549, as well as the Congressional action taken on the original copyright law and on the numerous attempts to amend the copyright law prior to Public Law 92-140, are a clear expression of the Congressional will to refuse recordings fixed or published prior to February 15, 1972, the monopoly protections of copyright.

tent of the copying involved,[8] but upon the conclusion that an unpatented or uncopyrighted article in the public domain is not entitled to any protection at all. In short, as this Court stated in *Sears:*

> "The judgment below . . . gave Stiffel the equivalent of a patent monoploy on its unpatented lamp. That was error. . . ." 376 U.S. at 233.

Similarly, in *Compco* this Court stated that:

> "[I]f the design is not entitled to a design patent or other federal statutory protection, then it can be copied at will. . . . That an article copied from an unpatented article *could be made in some other way* . . . or that there may be 'confusion' among purchasers as to which article is which or as to who is the maker, may be relevant evidence in applying a State's law requiring such precautions as labeling; however, and regardless of the copier's motives, neither these facts *nor any others* can furnish a basis for imposing liability for or prohibiting the actual acts of copying and selling. (Emphasis added.) (376 U.S. at 238-29.)[9]

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[8]In *Compco,* for example, this Court held that an item in the public domain can be copied "in every detail". (376 U.S. at 238).

[9]The petitioner's view of *Sears* and *Compco* is supported by the reliance of this Court, in *Sears,* on *G. Ricordi and Co. v. Haendler,* 194 F.2d 914 (2d Cir. 1952). In *G. Ricordi*—the only case cited by this Court in support of its holding that a state may not prohibit the copying of an uncopyrighted article (376 U.S. at 233)—the copier made photographic copies of the plaintiff's books so that he could use a cheap offset method of printing to produce an identical book, when he then sold. This was not an "imitation" type of copying. Rather, it was the exact kind of copying proscribed by Penal Code §653h, as it can reasonably be said that Petitioners were charged with and convicted of making "electronic photographs" of phonograph records.

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In the instant case, if California Penal Code §653h is allowed to stand the state will have created a monopoly in favor of record companies with respect to pre February 15, 1972 sound recordings which is even greater than the copyright monopoly created by Congress (Public Law 92-140) for post February 15, 1972 sound recordings. Such a monopoly created by one state in favor of one of its favorite enterprises, to the determent of interstate commerce and the general consumer, is not compatible with the goal of uniform national copyright laws, as announced in *Sears* and *Compco.*[10]

It is in the interest of the public and the copyright proprietor of the underlying musical composition[11] to permit widespread duplication of popular performances which Congress has determined should be in the public domain.[12] The states cannot subvert this deter-

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Judge Learned Hand, writing for a unanimous court, held in *G. Ricordi* that whether the book could be protected was a question for Federal law, not State law, and since the book was not copyrighted "the defendant was free to photograph and sell the plaintiff's book." (194 F.2d at 916.) Further, the *G. Ricordi* court specifically overruled anything to the contrary in *Fonotipia Limited v. Bradley,* 171 Fed. 951 (1908), a District Court case which had prohibited the duplication of musical recordings as unfair competition under state law.

[10]The position of the tape copiers with respect to the current monopoly aspects of the recording industry is set out at Hearings on S 646 and H. R. 6927, House of Representatives, Committee on the Judiciary, Subcommittee No. 3, 92nd Cong., 1st Sess. (1971) at pages 82-114.

[11]Federal law has always provided protection for such copyright proprietor (Title 17 U.S.C. §§ 1(e) and 101(e)), while nevertheless allowing unlicensed copying if there is compliance with such sections. *Dutches Music Corp. v. Stern,* 331 F. Supp. 127 (D.C. Ariz. 1971).

[12]There should be little doubt that the performances embodied on sound recordings are in the public domain since they are not copyrighted and have been generally sold to the public. *Gantz v.*

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mination by granting the equivalent of copyright protection.

Harris, 98 F. Supp. 906, 910 (S.L.N.Y. 1951) aff'd (with approval on this point) and modified (on other grounds) 198 F.2d 585 (2d Cir. 1952); *McIntyre v. Double-A Music Corp.*, 166 F. Supp. 681 (S.D. Cal. 1958). The only possible argument that the sale of countless copies of a recorded performance does not constitute publication is that such recorded performances are not copyrightable. However, this argument must fall in light of the strong public policy favoring a uniform national copyright law. Further, the protection granted under Penal Code §653h is unlimited whereas under the copyright laws it would be limited to twenty-eight (28) years.

This exact question of whether the complete commercial exploitation of a product, not subject to copyright, constitutes a publication was discussed by Judge Learned Hand in *Fashion Originators Guild v. F.T.C.*, 114 F.2d 80, 83 (2d Cir. 1940) *aff'd.* 312 U.S. 457 (1941).

> "When in this country the Constitution (§8, cl. 8, Art. I) gave to Congress power to 'secure' to authors the 'exclusive Right to their * * * Writings,' it was to be only 'for limited Times,' and did not allow a perpetual copyright. The purpose so disclosed is certainly inconsistent with the assumption that an author—notwithstanding publication and full enjoyment of his 'common law property'—might maintain his monopoly for 'unlimited Times'."

The Court held:

> "It would certainly be a strangely perverse anomaly that turned the grant of statutory copyright into a detriment to the 'author'; yet it would be hard to prove that the statutory remedies conferred made up for the limitation of the monopoly. Omission of property from the act would be a bonanza to those who possessed property of that kind." *Fashion Originators Guild, supra,* at 83.

It is interesting to note that Judge Hand's opinions, written well before *Sears* or *Compco,* consistently held that there was no room for state law controls over matters which were "writings" within the meaning of Article 1, Section 8, Clause 8 of the United States Constitution. Judge Hand so held in such cases as *G. Riccordi v. Haendler, supra; Fashion Originators Guild v. F.T.C., supra; Cheney Bros. v. Doris Silk Corp.*, 35 F.2d 279 (2d Cir. 1929) cert. den. 281 U.S. 728 (1930); and finally in his dissent in *Capitol Records v. Mercury Records Corp.*, 221 F.2d 657 (2d Cir. 1955).

In the *Capitol Records* case Judge Hand would have held that state law may not prohibit the unlicensed copyring (or duplication) of phonograph records. It is important to note that Judge Hand's dissent in that case has been referred to as "prophetic" in light of this Court's decisions in *Sears* and *Compco. CBS v. DeCosta,* 377 F.2d 315, 319 (1st Cir. 1967).

3. Petitioners' Position Is Supported by the Leading Copyright Authority in the United States.

Professor Melville B. Nimmer has written in his authorative treatise on the law of literary, musical and artistic property, *Nimmer On Copyright* at pages 55-56, (1971 Supplement):

> "Note that Chapter 982, Section 441-c of the New York Penal Law, and California Penal Code Section 653h both provide that record priacy (transferring of recorded sounds) for purposes of profit, or the knowing sale of records thus made, constitutes a misdemeanor. (See also Los Angeles Municipal Code, Section 42.19.1) Insofar as the records thus pirated have been theretofore published, the constitutionality of such penal provisions is *most* questionable under the *Sears* and *Compco* doctrine." (Emphasis added.)

At another point Professor Nimmer discusses the cases, relied on by the Court below to uphold the constitutionality of Penal Code Section 653h, as follows:

> "The main distinction relied upon in these cases is that 'there is a vital distinction between imitating an unprotected item (which was done in *Sears* and *Compco*) and the actual appropriation of another's work product, skill and investment as was done in the instant case' . . . It is difficult to see any substance in this asserted distinction between 'copying' and 'appropriation.' How does 'appropriation' in record piracy differ from 'copying' in *Sears* and *Compco*? In neither case is there an actual taking of the plaintiff's *tangible* work product. In each case there is a reproduction of the plaintiff's creative work. It is true that in the case

of record piracy such reproduction is accomplished by mechanical means rather than via the human hand or ear, but why is that significant? Could any greater state law liability attach to the photographic reproduction of a Rembrandt (or other public domain painting) than would be true in the case of a free hand copying? If phonograph records were protected by statutory copyright, clearly such protection could prohibit reproduction by tape duplication or other mechanical means. Assuming, then, the rationale of *Sears* and *Compco*, Congressional withholding of such copyright protection precludes state law liability for such reproduction." *Nimmer On Copyright*, at 18 (1971 Supplement).

4. Petitioners' Position Is in Accord With the Position of the United States Department of Justice.

The Department of Justice, through the Office of the Deputy Attorney General, filed an opinion letter with the House of Representatives committee studying Senate Bill 646.[13]

The letter states that under existing law sound recordings are not copyrightable; that the record industry has been able to fashion some protection "against competitors who commercially transcribe their recorded performances, based upon the misappropriation theory of *International News Service v. Associated Press*, 248 U.S. 215, 236 (1918)"; and that "the Court of Appeals for the First Circuit has held that *Sears* and *Compco* overruled *International News Service*. *Colum-*

[13]Hearings on S 646 and H.R. 6927, House of Representatives Committee on the Judiciary Subcommittee No. 3, 92nd Cong., 1st Sess. (1971), at pages 121-123.

bia Broadcasting System, Inc. v. De Costa, 377 F.2d 315, 318 (C.A. 1)."

The Justice Department then states in the letter:

> "*We believe that extending copyright to recordings is the soundest, and in our interpretation of Sears and Compco, the only way in which sound recordings should be protected.* Copyright protection is narrowly defined and limited in duration, whereas state remedies, whose validity is still in doubt, create broad and unwarranted perpetual monopolies." (Emphasis added.)

The above quotation is a clear statement of support by the Justice Department for appellants' position in the instant case.

Conclusion.

For the reason stated above Petitioners request that this Court issue a Writ of Certiorari in the instant case.

Respectfully submitted,

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APPENDIX A.

Opinion of the Superior Court of the State of California.

In the Appellate Department of the Superior Court, of the State of California for the County of Los Angeles.

People of the State of California, Plaintiff and Respondent, vs. Donald Goldstein, et al., Defendants and Appellants. Superior Court No. CR. A. 10672.

Trial Court No. 381759.

On Appeal from the Municipal Court of the Los Angeles Judicial District, County of Los Angeles, State of California. Erlch Auerbach, Judge (653(h)PC).

This cause having been argued and submitted and fully considered, judgment is ordered as follows:

It is Ordered and Adjudged that the judgment made and entered in the Municipal Court of the Los Angeles Judicial District, County of Los Angeles, State of California, in the above entitled cause be and the same is hereby affirmed. The appeal from the order denying motion to suppress evidence under Penal Code §1538.5 and the non appealable order denying motion to dismiss is dismissed.

MEMO.

At oral argument, both counsel urged us to decide this case on the broad ground of the constitutionality of California Penal Code section 653(h). On this score, we agree with the holding of *Tape Industries Association of America vs. Younger* [C.D. Cal. 1970] 360 F. Supp. 340 that said section is permissible state regulation directed against theft and appropriation of salable products and does not unconstitutionally intrude on federal policies enunciated in the Copyright Clause

(U.S. Const. art I §8 cl. 8). Based upon that case and the reasoning in *Capitol Records, Inc. vs. Erickson* [1969] 2 Cal. App. 3d 526 [82 Cal. Rptr. 798], we affirm the judgments.

In their brief, appellants raise certain issues as to the search warrants. Upon the record before us, we see no prejudicial errors present in this phase of the appeal.

NOV. 12, 1971.

BY THE COURT.

WHYTE
Presiding Judge.

WONG
Judge.

ZACK
Judge.

APPENDIX B.

Order Denying Rehearing and Granting Certification.

Appellate Department of the Superior Court, of the State of California for the County of Los Angeles.

People of the State of California, Plaintiff and Respondent, vs. Donald Goldstein, et al., Defendants and Appellants. Superior Court No. CR. A 10672, Municipal Court of the Los Angeles Judicial District No. 381759.

The petition of appellants for a rehearing after judgment of this court on appeal, or, in the alternative, petition for certification of cause of the Court of Appeal in the above-entitled case, having been filed and having been duly considered,

The petition for rehearing is hereby denied;

The alternative petition for certification of cause to the Court of Appeal is granted.

Dated November 30, 1971.

BY THE COURT.
WHYTE
Presiding Judge
WONG
Judge
ZACK
Judge

APPENDIX C.

Order Certifying Cause to Court of Appeal.

Appellate Department of the Superior Court, of the State of California for the County of Los Angeles.

People of the State of California, Plaintiff and Respondent, vs. Donald Goldstein, et al., Defendants and Appellants. Superior Court No. CR. A 10672, Municipal Court of the Los Angeles Judicial District No. 381759.

Pursuant to Rule 63(a), (b) and (c), California Rules of Court, upon timely motion of the appellants, we certify that the transfer of the above-entitled cause to the Court of Appeal appears necessary to settle an important question of law.

The question so presented is:

Is Section 653(h) of the California Penal Code constitutional?

Appellants attack said section mainly on the basis of *Sears Roebuck & Co. v. Stiffel Company* [1964] 376 U.S. 225 [11 L.Ed.2d 661] 84 S.Ct. 184 and *Compco Corp. v. Day-Bright Lighting, Inc.* [1964] 376 U.S. 234 [11 L.Ed.2d 669] 84 S.Ct. 779, while in our opinion holding the section constitutional we relied upon the distinguishing features set out in *Tape Industries Association of America v. Younger* [C.D. Cal. 1970] 316 F.Supp. 340 and *Capitol Records, Inc. v. Erickson* [1969] 2 Cal.App.3d 526 [82 Cal.

Rptr. 798]. A copy of our brief opinion is attached hereto.

Dated: Nov. 30, 1971.

BY THE COURT.
WHYTE
Presiding Judge
WONG
Judge
ZACK
Judge

APPENDIX D.

Order Denying Transfer.

In the Court of Appeal of the State of California, Second Appellate District, Division Two.

People of the State of California, Plaintiff and Respondent, v. Donald Goldstein, et al., Defendants and Appellants. 2d Crim. No. 21081, Superior Court No. CR. A. 10672, Trial Court No. 381759.

THE COURT:

The record on transfer in the above entitled cause having been filed in this court on December 2, 1971, pursuant to certification made by the Appellate Department of the Superior Court of Los Angeles County, and this court having considered the matter of whether such cause should be transferred to this court for hearing and decision,

NOW, THEREFORE, IT IS ORDERED that such transfer be and it hereby is denied.